86-531

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1986

CROWN LIFE INSURANCE COMPANY, et al.,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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and Clarke Burton Lloyd

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QUESTIONS PRESENTED

I. Whether the Third Circuit decision is in conflict with the Sixth Circuit and *Wilson v. Garcia* as to the proper approach to the determination of the applicable statute of limitations period in civil RICO claims.

II. Whether RICO provides a civil remedy for a person allegedly injured by a predicate act when, as that person admits, there was no pattern of racketeering activity at the time of injury.

III. Whether the Court of Appeals' decision is in conflict with *Celotex Corporation v. Catrett* and *Anderson v. Liberty Lobby, Inc.* in that it relies upon pleadings in the Malley-Duff Complaint to establish a pattern of racketeering activity in the face of a supported motion for summary judgment.

PARTIES TO THE PROCEEDINGS

Petitioners, Crown Life Insurance Company and Clarke Burton Lloyd, were Appellees below on the issues presented for review.[1]

Clarke Burton Lloyd is an individual, a Canadian citizen and a resident of Chicago, Illinois. Respondent, Malley-Duff & Associates, Inc., was Appellant below on the issues for review. Malley-Duff & Associates, Inc. is a Pennsylvania corporation which has its office in Pittsburgh, Pennsylvania.

Crown Life Insurance Company is a partly owned subsidiary of Crownx, Inc., which has its headquarters in Toronto, Ontario, Canada. The following are nonwholly owned subsidiaries of Crown Life Insurance Company: Crown Financial Management Ltd. with headquarters in London, United Kingdom; Crown Eagle Life Insurance Company Ltd. with headquarters in Jamaica; and Crown Life Carribean Ltd. with headquarters in Trinidad—Tobago.

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[1]The other parties who were Appellees below were Agency Holding Corporation, an Illinois corporation, Agency Holding Corporation, an Ohio corporation, Kerry Patrick Craig, Diane Pariano, Erhman Ratini Oglevee and Craig, Inc., a Pennsylvania corporation, and Robert Oglevee.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Crown Life Insurance Company and Clarke Burton Lloyd, respectfully request that a writ of certiorari issue to review the judgment and decision of the Court of Appeals for the Third Circuit entered on May 30, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals (A-1) is reported at 792 F.2d 341. The District Court's ruling granting the Petitioners' motion for summary judgment is not officially reported, but is provided in the Appendix (C-1).

JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1986. Petitioners filed a timely petition for rehearing under Federal Rules of Appellate Procedure 35(b) and 40(a). On July 1, 1986, the petition was denied (B-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, provides in relevant part:

> Any person injured in his business or property by reason of violation of Section 1962 of this chapter may sue therefor in any appropriate United States District Court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Id. at § 1964(c).

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of Section 2, Title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another

> to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

Id. at § 1962.

The relevant Pennsylvania statute of limitations, 42 Pa.Con.Stat.Ann. § 5524 provides:

> The following actions and proceedings must be commenced within two years:
>
> (1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.

(2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

(3) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof.

(4) An action for waste or trespass of real property.

(5) An action upon a statute for a civil penalty or forfeiture, where the action is given to a government unit.

(6) An action against any officer or any government unit for the nonpayment of money or the nondelivery of property collected upon on execution or otherwise in his possession.

The catchall statute of limitations § 5527 provides:

The following actions and proceedings must be commenced within six years:

. . .

(6) Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by section 5531 (relating to no limitation).

STATEMENT OF THE CASE

Malley-Duff & Associates, Inc. ("Malley-Duff"), a Pennsylvania corporation, was brokerage general agent in the Pittsburgh area for defendant, Crown Life Insurance Company ("Crown"), a Canadian corporation engaged in the business of selling life, health and accident insurance,

under a general agency contract which contained the following provision:

> This agreement may be terminated on one month's notice by either party and such notice will be deemed to be given when a registered letter containing the notice is mailed, addressed to the party entitled to the notice at the party's last known address.

Under date of January 11, 1978, defendant, Crown, wrote by registered mail to Malley-Duff giving notice of termination pursuant to the above quoted provision, effective one month from the date of mailing the letter. On February 10, 1978, Malley-Duff brought suit in equity in the Court of Common Pleas of Allegheny County, Pennsylvania, against Crown and Clarke Burton Lloyd, then its Vice President for United States Agencies, seeking to enjoin the termination of the agency contract, and by motion dated February 10, 1978, asked for a preliminary injunction. A hearing on the motion was held before Judge (now Justice) Flaherty on February 15 and 16, 1978, and after the submission of Briefs, Judge Flaherty entered an Order dated February 22, 1978, stating, "... the motion for preliminary injunction is herewith refused." Thereafter, Crown filed Preliminary Objections asserting the availability of an adequate, nonstatutory remedy at law, and asking that the case be transferred to the law side, but this Objection was never brought on for argument. The plaintiff has permitted the equity suit to remain dormant.

On April 5, 1978, Malley-Duff filed an action in federal court (*Malley-Duff I*) against the present Petitioners and the Crown general agents in Chicago and Cleveland, and an individual, Kerry Patrick Craig ("Craig"), complaining about the selfsame termination of its general agency contract with Crown Life, this time setting forth

eight counts (Civil Action No. 78-373-W.D.Pa.). This action asserted claims under the federal antitrust laws for conspiracy and monopolization and, under the common law of Pennsylvania, for breach of contract, malicious interference with the contract, conspiracy or concerted refusal to deal, and for punitive damages.

A five-week trial began on March 8, 1983. At the conclusion of plaintiff's evidence, a directed verdict was granted by the trial court in favor of all of the defendants on each of the counts asserting a violation of the antitrust laws and the count charging breach of contract. The other common law claims were permitted to go to the jury. The jury found that there was no liability for tortious interference with a contractual relation and no liability for a conspiracy with the intent to injure, and refused to assess punitive damages. Some of the defendants, namely Crown, Lloyd and Craig, were found to be liable in the amount of $900,000 on a theory of conspiracy to tortiously interfere with a contract.

All parties appealed to the Court of Appeals for the Third Circuit. On May 7, 1984, that Court reversed the trial court, reinstated the antitrust counts and ordered a new trial, overturning the jury verdict against the defendants. *Malley-Duff & Associates, Inc. v. Crown Life Insurance Company, et al.*, 792 F.2d 341 (3rd Cir. 1986). A Petition for Certiorari to the United States Supreme Court was filed timely. This Petition was denied.

Meanwhile, on March 20, 1981, Malley-Duff had commenced this second action against Crown, Lloyd and various other defendants (*Malley-Duff II*). Malley-Duff alleged violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (Supp. 1970-83) ("RICO"), the Civil Rights Act, 42 U.S.C. § 1985 and the

common law of Pennsylvania based upon alleged acts of some defendants during and in connection with the discovery phase of *Malley-Duff I*. *Malley-Duff I* and *Malley-Duff II* were consolidated for discovery purposes, but prior to the date set for trial, the Court severed the two actions, and *Malley-Duff I* was tried alone.

Following the trial of *Malley-Duff I*, on March 23, 1984, the District Court granted defendants' motion for summary judgment on all federal law counts in *Malley-Duff II* and dismissed the state law claims (C-13). Malley-Duff appealed from that order. On May 30, 1986, a panel of the Court of Appeals for the Third Circuit reversed the District Court's grant of summary judgment on the RICO claims, as well as one claim under § 1985(2), and reversed the dismissal of the pendant state claims (A-30).

Crown Life Insurance Company and Clarke Burton Lloyd filed a timely petition for rehearing pursuant to Federal Rules of Appellate Procedure 35(b) and 40(a). On July 1, 1986, the petition was denied (B-1).

STATEMENT OF THE FACTS

During the years immediately prior to the decision to terminate Malley-Duff, the production of that agency had leveled off. This leveling of production occurred at a level just in excess of Five Million ($5,000,000) Dollars annually. That figure represents the threshold at which a Crown brokerage general agent is rewarded with an increased bonus, in addition to regular commissions, the increased bonus being computed on the entire $5,000,000, as well as on any additional production. The production level regularly attained by Malley-Duff indicated that once this threshold was attained and the increased bonus on past

production received, no further effort was expended. Malley was no longer willing to devote the time and effort necessary to increase the Agency's production. Duff wanted to buy Malley's interest in the agency, but putting more business on the books would only have raised the net worth of the agency and, hence, the price of Malley's interest. The result was a standoff. Crown recognized this fact and urged Malley-Duff to increase its penetration in the Pittsburgh market. These requests went unheeded. Crown had repeatedly warned Malley-Duff that its representation of Crown in the Pittsburgh market had been grossly inadequate. Despite these warnings, Malley-Duff's production continued to lag.

On August 19, 1977, confirming an earlier conversation, defendant Lloyd wrote Malley-Duff and set forth a standard of production that was expected of Malley-Duff in order to retain its status as the Crown Life brokerage general agent in Pittsburgh. This warning was repeated by letter two months later. Malley-Duff failed to improve its marketing efforts. Lloyd recommended that Malley-Duff be terminated as general agent. This recommendation was adopted by senior management. On January 11, 1978, Crown wrote to Malley-Duff giving notice of its intent to terminate Malley-Duff as its general agent in Pittsburgh pursuant to the express provisions of the general agency contract. Upon the request of Malley-Duff, the termination was reconsidered by Crown but Lloyd's superiors, Michael Hutchison, Marketing Vice President of Crown, and Robert Dowsett, President of Crown, adhered to their decision to terminate Malley-Duff. Termination became effective on February 11, 1978.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT DECISION IS IN CONFLICT WITH THE SIXTH CIRCUIT AND *WILSON v. GARCIA* AS TO THE PROPER APPROACH TO THE DETERMINATION OF THE APPLICABLE STATUTE OF LIMITATIONS PERIOD IN CIVIL RICO CLAIMS.

There is a split in the Circuit Courts of Appeals over whether the reasoning of *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938 (1985), requires the application of a single statute of limitations period to all civil RICO claims. At the time the Third Circuit came to its decision in the present case, in which it held that a single statute of limitations should be applied, it was aware that it was in direct conflict with a recent decision of the Sixth Circuit (A-16). *Silverberg v. Thomson McKinnon Securities, Inc.*, 787 F.2d 1079 (6th Cir. 1986). The *Silverberg* court refused to apply the reasoning of *Wilson*, holding instead that the appropriate limitations period had to be determined by the facts of the specific case.[2] This conflict between the Circuits should be resolved by this Court. Whichever side of the conflict this Court adopts, however, requires a reversal of the Third Circuit's decision in the present case.

A. The Conflict

Silverberg involved a wide variety of claims under common law fraud, negligence and securities laws, as well as RICO. The plaintiff's Complaint alleged that the defendants fraudulently induced them to speculate in the options

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[2]Although no other Circuit Court has ruled directly on the question, there is a split among the several District Courts which have addressed the issue.

market and mishandled their accounts. Although the District Court had dismissed the RICO claim on a theory of claim preclusion resulting from a prior state court action, the Sixth Circuit affirmed the District Court on the ground that the RICO claim was barred by Ohio's four-year common law fraud statute of limitations, Ohio.Rev.Code § 2305.09(C).

The Sixth Circuit believed that *Wilson* did not mandate a single statutory period for civil RICO claims. Its rejection of the *Wilson* approach was based upon the finding that a significant factor relied upon by this Court in *Wilson* was absent. It noted that 42 U.S.C. § 1983 provides a "uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Consitution and laws of the Nation," and that § 1983 could have no precise counterpart in state law, because it is essentially "supplementary to any remedy the State might have." *Id.* at 1083 (quoting *Wilson,* 105 S. Ct. at 1945). Because civil RICO claims do not provide a uniquely federal remedy, the Sixth Circuit reasoned, a uniform statute of limitations need not be applied. The court also placed significance on Congress's specific consideration and rejection of the inclusion of a limitation period in the RICO statute.

The Third Circuit took care to make it clear that it did not disagree entirely with the Sixth Circuit. It said, "We do not suggest that civil RICO is a uniquely federal remedy in the same sense as § 1983. A state could, as some have, create a private cause of action substantially similar to civil RICO." (A-13, n.13). Nevertheless, the Third Circuit based its adoption of the *Wilson* approach upon two considerations: first, analogies between RICO and traditional state causes of action are imperfect and, second, a uniform

limitations period would increase the effectiveness of the statute (A-16).

The decisions of the Sixth and Third Circuits are irreconcilable and, in order to eliminate the confusion, it is necessary for this Court to instruct the Circuits as to which approach to take.

B. The Most Appropriate Statute of Limitations

Whichever approach this Court may decide upon, the appellants' position is that the most appropriate Pennsylvania statute of limitations is its two-year statute concerning injury to one's business or property. Whether the court is looking for the most appropriate statute of limitations to apply in all RICO claims, or for the one most appropriate to the facts and circumstances of this case, there is but one bona fide candidate, 42 Pa.Con.Stat.Ann. § 5524(3) and (4) (Purdon 1981). The Third Circuit's adoption of the Pennsylvania six-year catchall statute of limitations, 42 Pa.Con.Stat.Ann. § 5527(b) (Purdon 1981), for all RICO claims is inappropriate under either theory. It should be noted in this context that the Third Circuit was factually incorrect when it stated that the parties agreed that common law fraud was the most analogous state cause of action to the present RICO claim. (A-7) (See, Supplemental Brief of Crown and Lloyd to the Third Circuit, p. 8-9)

The gravamen of Malley-Duff's Complaint is that its business was injured by the termination of its agency agreement with Crown. Under 18 U.S.C. § 1964(c), a person has a civil RICO action against others for damages to one's "business or property." Under Pennsylvania law, there exists a two-year statute of limitations period for any action concerning injury to one's business or property, real or personal. Title 42 Pa.Con.Stat.Ann. § 5524(3) (Purdon

1981) states that a two-year statute of limitations period exists for "an action for taking, detaining or injuring personal property . . ." Personal property as defined in Pennsylvania is "everything except real estate," *McGlathery's Estate,* 311 Pa. 351, 354, 166 A. 886, 887 (1933), and includes intangible personal property. *Home for Crippled Children v. Erie Insurance Exchange,* 130 P.L.J. 480 (C.P.Alleg. 1982), *aff'd. mem.* 329 Pa. Super. 610, 478 A.2d 84 (1984) (analyzing the present relevant statute and holding that tortious interference with a contractual relationship is controlled by the two-year statute). Accordingly, personal property includes a business. In fact, the Third Circuit itself adopted the reasoning of *Home for Crippled Children* and held that the two-year statute of limitations period applied to a claim for tortious interference with employment contracts. *Mazzanti v. Merck & Co.,* 770 F.2d 34, 36 (3rd Cir. 1985). In addition, § 5524(4) provides a two-year period for tortious conduct affecting real estate. A more appropriate statute of limitations period cannot be found under Pennsylvania law following the case by case approach of the Sixth Circuit.

If this Court should adopt the Third Circuit's holding that a *Wilson v. Garcia* approach is required, then this Court is requested to correct the misapplication of *Wilson* in the present case.

The critical question to be answered in determining the "most appropriate" or the "most analogous" statute of limitations to apply to civil RICO claims is: What is the best characterization of the essence of the claim? *Wilson,* 105 S. Ct. at 1943. In addressing this question for the purposes of 42 U.S.C. § 1983, this Court recognized that

the "§ 1983 remedy encompasses a broad range of potential tort analogies, from injuries to property to infringements of individual liberty." *Id.* at 1948. This Court focused on the nature of the injury alleged as opposed to the various potential sources of injury and stated, "In view of our holding that § 1983 claims are best characterized as personal injury actions, the Court of Appeals correctly applied the 3-year statute of limitations governing actions 'for an injury to the person or reputation of any person.' " *Id.* at 1949.

RICO civil claims, based upon the language of § 1964(c) itself, are best characterized as remedies for injuries to business or property. Section 5524(3) and (4) governs injuries to personal or real property including business property.

Although, as the Third Circuit pointed out, Section 5524 might not apply to all of the predicate acts, it would apply to any trespass against business or property encompassed by 18 U.S.C. § 1964(c). Tortious interference with business or property is the evil against which the Congress enacted RICO and provided a protective civil remedy.

If the courts are to limit an unfettered use of the RICO statute in cases not involving organized crime, it would be most appropriate to apply the same state statute which is used in a claim for tortious interference with a contractual relationship and thus provide the protection against tortious interference with businesses or other personal property which is a specific concern of § 5524(3) and (4). Such a two-year limitation would not be contrary to the federal mandate. In fact, it would indeed be strange to find that a two-year statute of limitations would apply in the case of a common law claim for tortious interference with a business relationship, but that a claim for the same tortious

interference with the same business relationship would have a sixth-year statute of limitations because it was framed as a RICO violation.

II. RICO DOES NOT PROVIDE A CIVIL REMEDY FOR A PERSON ALLEGEDLY INJURED BY A PREDICATE ACT WHEN AS THAT PERSON ADMITS THERE WAS NO PATTERN OF RACKETEERING ACTIVITY AT THE TIME OF INJURY.

The Third Circuit categorized Malley-Duff's RICO claims into two categories: (1) claims arising out of the allegedly fraudulent termination of the agency, and (2) claims arising out of the alleged obstructions of justice by defendants during the course of the discovery phase of *Malley-Duff I* (A-5). With respect to the first category, Malley-Duff has taken the position that only one predicate act occurred as of the date of the termination of its agency agreement for which it seeks RICO damages.

The Third Circuit said, "A large part of the briefing and argument in this matter has been devoted to the difficult issue of when the RICO claims accrued" (A-8, n.8). It then went on to say that because it adopted a six-year period, it would not reach the accrual issue. Whether or not a RICO cause of action had accrued on or before February 11, 1978, is a fundamental one under § 1964(c), because a RICO injury must be by reason of conduct constituting a pattern of racketeering activity. It is contrary to *Sedima, S.P.R.L. v. Imrex Co.*, ____ U.S. ____, 105 S. Ct. 3275 (1985), to change a single predicate act into a pattern of racketeering injury by predicate acts allegedly occurring months and years later. The *cause* of a RICO

injury (a pattern of racketeering activity) cannot be preceded by its *effect* (a RICO injury).

In its Briefs before the Third Circuit, as well as at oral argument, Malley-Duff conceded that no cause of action had accrued under RICO on or before the termination of its agency:

> . . . [T]he District Court erred by computing the statute of limitations from a date which preceded the existence of a cause of action under RICO. The trial court inexplicably segregated plaintiff's RICO claims into the constituent acts of racketeering, which injured Malley-Duff, i.e., the mail fraud resulting in Malley-Duff's termination and the obstructions of justice (Footnote 12). It then applied the statute of limitations not to Malley- Duff's RICO claim, but to the first racketeering activity, mail fraud, as if plaintiff were suing directly under 18 U.S.C. § 1341.

Malley-Duff Brief to the Third Circuit, p. 32.

> When defendant fraudulently terminated plaintiff, *no RICO cause of action existed since there were no multiple acts of racketeering.*

Id. at 33-34 (Emphasis added).

> Such computation anomalously caused the statute of limitations to begin before a cause of action existed under RICO.

Id. at 34.

> At a minimum, the statute of limitations for a RICO claim cannot commence until the cause of action has accrued.

Id. at 34-35.

> Ignoring the requirement of a pattern of racketeering activities, the court assumed that Malley-Duff could have brought a RICO claim immediately after its fraudulent termination, *the first predicate act.*

Malley-Duff Supplemental Brief, p.2. (Emphasis added).

> As noted above, and in Appellant's principal Brief, the District Court inexplicably seized upon Malley-Duff's mail fraud allegations as if plaintiff could have commenced a RICO action at the time of its termination. Judge Bloch computed the statute of limitations from that date *even though no cause of action under RICO had accrued.*

Id. at 8 (Emphasis added).

All of the above admissions of Malley-Duff were made in its Briefs to the Third Circuit on the summary judgment issue. We agree with these statements that no RICO cause of action had accrued in February of 1978.

Subsections (a), (b), (c) and (d) of § 1962 of RICO all require a "pattern of racketeering activity." *United States v. Elliott,* 571 F.2d 880, 903 (5th Cir.), *cert. denied* 439 U.S. 953 (1978); *Temporaries, Inc. v. Maryland Nat'l Bank,* No. Y-84-4516 (D.C. Md. June 6, 1986); *Eaby v. Richmond,* 561 F. Supp. 131, 134 (E.D. Pa. 1983).

At Footnote 14 of *Sedima, supra,* page 3285, this Court said:

> As many commentators have pointed out, the definition of a 'pattern of racketeering activity' differs from the other provisions in § 1961 in that it states that a pattern "*requires at least two acts of racketeering activity,*" § 1961(5) . . . . The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report

> explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." (Emphasis added).
>
> Section 1964 of RICO states, in pertinent part:
>
> Any person injured in his business or property *by reason of a violation of Section 1962 of this chapter* may sue therefor in any appropriate United States District Court . . . (Emphasis added).

Since *Sedima,* a number of courts have attempted to take a fresh look at what constitutes a pattern. Because RICO requires a minimum of two predicate acts, under even the most liberal of these new concepts of pattern, one admitted predicate act cannot constitute a pattern.

One concept of pattern recognizes that a "pattern" connotes a multiplicity of events:

> Surely the continuity inherent in the term presumes repeated criminal *activity*, not merely repeated *acts* to carry out the *same* criminal activity. It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.'

Northern Trust Bank/O'Hare v. Inryco, Inc., 615 F. Supp. 828, 831 (N.D. Ill. 1985) (Emphasis in original).

The *Inryco* court suggested that a pattern requires more than a single scheme, *Id.* at 833, and, like *Sedima,* emphasized the "continuity plus relationship" concept. *See also, Allright Missouri, Inc. v. Billeter,* 631 F. Supp. 1328 (E.D. Mo. 1986); *Allington v. Carpenter,* 619 F. Supp. 474 (D.C. Cal. 1985); *Professional Assets Management,*

Inc. v. Penn Square Bank, 616 F. Supp. 1418 (W.D. Okla. 1985).

In *Superior Oil Co. v. Fulmer,* 785 F.2d 252 (8th Cir. 1986), the Eighth Circuit also adopted the *Inryco* position that several predicate acts comprising one continuing scheme was insufficient to constitute a pattern, especially when there was no proof that the defendants had ever done these activities in the past, or that they were engaged in criminal activities elsewhere. *Id.* at 257.[3]

Put simply, RICO requires, at a minimum, two predicate acts. This Court said, ". . . [T]he compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, . . ." *Sedima,* 105 S. Ct. at 3286. Because there had been only one alleged predicate act at the time Malley-Duff's agency agreement was terminated, its business had not been injured by a *pattern of racketeering activity* and, therefore, no RICO cause of action had accrued.

Alleged acts that occurred after the termination, such as alleged fraudulent nonpayment of renewal commissions, do not give Malley-Duff a RICO cause of action for the alleged injury that occurred on February 11, 1978.[4]

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[3]Malley-Duff admits that Agency Holding was appointed as general agent in Chicago and Cleveland prior to the termination of the Malley-Duff agency in Pittsburgh. The inability of Malley-Duff to identify predicate acts, other than the alleged August, 1977 letter, in connection with its termination, or predicate acts in the acquisition of other agencies prior to its termination, underscores the frivolousness of its RICO claim.

[4]In fact, in the lengthy trial of *Malley-Duff I,* in which similar allegations were made, its counsel agreed that it had presented no evidence of failure to pay the proper vested renewal commissions and that issue did not go to the jury.

To claim that subsection (d) of 18 U.S.C. § 1962 (the conspiracy subsection) permits the combining of a predicate act which causes injury with acts subsequently occurring, in order to constitute a pattern, would also run counter to the ground upon which the holding of the Third Circuit in *Wells v. Rockefeller*, 728 F.2d 209 (3rd Cir. 1984), *cert. denied* _____ U.S. _____, 105 S. Ct. 2343 (1985) proceeded. *See also, Zenith Radio Corp. v. Hazeltime Research, Inc.*, 401 U.S. 321, 338-39 (1971). In *Wells*, the Third Circuit held that in a civil conspiracy case (these RICO claims are alleged to be a civil conspiracy, not a criminal conspiracy) the actual injury is the focal point for statute of limitations purposes.[5] "For each act causing injury, a claimant must seek redress within the prescribed limitations period." *Wells*, 728 F.2d at 217. *Wells* rejects the rule that the limitations period begins on the commission of the last overt act of the conspiracy and applies the rule that the period runs from each overt act causing damage.

The principal damage alleged by Malley-Duff was the termination of the agency. By Malley-Duff's own admission, the only predicate act alleged that preceded the termination of the agency was the so-called bogus quota letter of August 19, 1977. Because RICO requires that at least two predicate acts of racketeering activity have occurred prior to the damage, no RICO claim has been or can be stated as to the damages caused by termination of the agency.

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[5]There is a split of authority on when the limitations period for a civil conspiracy commences. Contrary to the Third Circuit, the Eighth Circuit applies the rule used in criminal cases, that is, the limitations period begins on the commission of the last overt act of the conspiracy. *White v. Bloom*, 621 F.2d 276, 281 (8th Cir.), *cert. denied* 449 U.S. 995, 101 S. Ct. 533, 66 L.Ed.2d 292 (1980). Thus, a grant of certiorari will also provide the court an opportunity to clarify this matter.

Malley-Duff has already sued these Petitioners and others under antitrust and common law interference claims. Just because it does not have a RICO cause of action in connection with the termination of the agency, does not mean that it does not have recourse if it can establish either antitrust or common law grounds for recovery.

III. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH *CELOTEX CORPORATION v. CATRETT* AND *ANDERSON V. LIBERTY LOBBY, INC.*, IN THAT IT RELIES UPON PLEADINGS IN THE MALLEY-DUFF COMPLAINT TO ESTABLISH A PATTERN OF RACKETEERING ACTIVITY IN THE FACE OF A SUPPORTED MOTION FOR SUMMARY JUDGMENT.

The Third Circuit stated that "According to the Complaint, the enterprise used similar means to acquire Crown Life agencies in Chicago, Peoria, Cleveland, Newark, Hartford, Denver and elsewhere" (A-4). "The Complaint relies on multiple violations of the federal mail and wire fraud statutes . . . to establish the necessary element of a 'pattern of racketeering activity.' " (A-6, n.3). In reversing the District Court grant of summary judgment the Third Circuit held, ". . . . Malley-Duff's allegations of similar conduct in Cleveland, Chicago and other cities seems to us a sufficient pleading of a 'pattern' of racketeering injury" (sic) (A-27, n.20).

However, because Malley-Duff failed to identify in opposition to the motion for summary judgment any predicate act in connection with the acquisition of any other agency, the Third Circuit's reliance on the pleadings is inconsistent with this Court's recent holdings in *Celotex*

Corporation v. Catrett, ____ U.S. ____, 106 S. Ct. 2548, 54 U.S.L.W. 4775 (U.S. June 25, 1986), and *Anderson v. Liberty Lobby, Inc.*, ____ U.S. ____, 106 S. Ct. 2505, 54 U.S.L.W. 4755 (U.S. June 25, 1986).

An initial observation is necessary before this inconsistency can be addressed. Although paragraph 21(f) of Malley-Duff's Complaint alleges various *Malley-Duff I* lawsuit related conduct, the Third Circuit wisely did not rely on these allegations in reversing the District Court's grant of summary judgment for alleged termination injuries. First, Malley-Duff has offered no evidence that the conduct alleged involved Crown or Lloyd, the present Petitioners, or that Crown or Lloyd conspired or associated with the other defendants with regard to them.[6] It is apparent that these alleged acts were not acts of the alleged enterprise, but at most, were independent and isolated acts of a few defendants. Secondly, the lawsuit conduct cannot pass the "continuity plus relationship" test if one attempts to construe it with the one alleged pre-termination predicate act into a pattern. The alleged impetus for the lawsuit conduct was the lawsuit itself. Thus, one would have to characterize the lawsuit conduct as so "isolated," "sporadic" and without the threat of "continuing activity" that in conjunction with the August, 1977 letter it could not constitute a pattern of racketeering activity.

In *Celotex*, this Court stated that:

> . . . [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails

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[6]District Court Judge Alan N. Bloch specifically charged the jury in the trial of *Malley-Duff I* that there was no evidence connecting Crown or Lloyd with the destruction of any evidence (Trial Transcript of April 14, 1983, p. 3264).

> to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 54 U.S.L.W. at 4777.

One of the essential elements of a RICO claim is that the conduct of the enterprise be through a *pattern* of racketeering activity. *Sedima,* 105 S. Ct. 3285. At a minimum, RICO requires Malley-Duff to establish the existence of two predicate acts sufficiently related to constitute a pattern. Malley-Duff's response to the motion for summary judgment is insufficient in this regard.

Nowhere in the relevant portion of the Complaint[7] is it alleged that any specific predicate act was committed in connection with the acquisition of any other Crown

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[7]Paragraph 21 of the Complaint states in relevant part that:

> defendants conspired to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs through the following acts of racketeering:
>
> (a) through the use of the mail and wire communications and by traveling in interstate and foreign commerce, defendants combined and conspired to acquire various Crown agencies, including plaintiff's, by false and fraudulent means and pretenses. On or about August 19, 1977, defendant, Crown, through Lloyd and Craig, imposed a production quota upon plaintiff for the fiscal year ending December 10, 1977. The production quota, however, was impossible to meet as defendants intended. The sole purpose for imposing the sham quota was to enable Crown, Lloyd, Craig and the remaining defendants to terminate plaintiff and to acquire its business;
>
> (b) when plaintiff's sales failed to meet the bogus quota, defendants, through the use of the mail and wire communications and by traveling in interstate and foreign commerce, terminated plaintiff and seized its business and goodwill without compensation;
>
> (c) as a consequence of the aforesaid acts, money and other financial remunerations gathered from plaintiff's business have

(Continued on next page)

agency. Subparagraph (e) only makes the sweeping allegation that similar acts occurred in the alleged defrauding of other agencies, and reliance by the Third Circuit on this pleading alone is insufficient under *Celotex* to defeat a motion for summary judgment. "Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), *except the mere pleadings themselves . . .*" *Id.* at 4777 (Emphasis added).

In *Celotex,* this Court held that there was no requirement in Fed.R.Civ.P. 56 that ". . . the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.* (Emphasis in original). Nevertheless, in Agency Holding's motion for summary judgment (D-1), adopted by Crown Life and Lloyd, Agency Holding supported its motion in keeping with the strict standards outlined by the dissenting Justices in *Celotex. Id.* at 4779. Agency Holding presented credible evidence that would entitle it to a directed verdict if not controverted. Agency Holding attached affidavits and, more particularly, excerpts of testimony, given at the injunction hearing in the equity suit brought by Malley-Duff against Crown Life

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(Continued)

been distributed among defendants and in interstate commerce through the use of the mails by defendants;

(d) under its agreement with Crown, plaintiff is entitled to receive renewal commissions for premiums paid on policies sold by plaintiff before it was terminated. By and through the use of the mail, defendants conspired to and did cause renewal commissions to be transferred from plaintiff to one or more defendants; and

(e) through acts similar to those averred in subparagraphs (a)-(d), defendants acquired Crown agencies and defrauded the terminated general agents out of renewal commissions in Chicago, Illinois, Peoria, Illinois, Cleveland, Ohio, Newark, New Jersey, Hartford, Connecticut, Denver, Colorado and elsewhere.

and Lloyd, on the facts surrounding the termination of Malley-Duff and the establishment of Agency Holding in Chicago (D-15 thru 79).

The testimony regarding the termination challenged Malley-Duff's allegation in its Complaint that the August 19, 1977 letter was false or fraudulent. The testimony shows that the letter was exactly what it purported to be—a truthful statement that Crown required Malley-Duff to perform at a level more in keeping with its and the Pittsburgh market's potential (D-44 thru 46, 50). Any reliance on the letter by Malley-Duff would not have caused it injury, but rather would have saved its agency relationship with Crown Life. Thus, the one alleged predicate act by the defendants was not a predicate act at all.

Malley-Duff's bare allegation in the Complaint concerning "similar" false and fraudulent acts in the acquisition of other agencies was also put in issue. Malley-Duff did not attempt to go beyond the pleadings to establish that there existed a genuine issue of fact or law concerning whether the letter was false or fraudulent and, more importantly, it failed to indicate any other "similar" act in connection with other agencies.

Agency Holding went even further. In its motion for summary judgment, it also included sworn testimony that its acquisition of the Chicago general agency was not, contrary to the allegation of the Complaint, the result of a termination at all, but rather followed the death of Crown's previous general agent and, thus, could not have involved and did not involve a "similar" quota letter (D-40, 41).

In addition, Malley-Duff conceded in its Brief in Opposition to the motion for summary judgment that the acquisition of the Chicago and Cleveland agencies

occurred prior to its own termination. By admitting that the August, 1977 letter was the only pretermination predicate act, Malley-Duff admitted that no predicate act occurred with respect to Chicago or Cleveland. Because no other "similar" act was ever identified, Appellees could have done no more to support its motion for summary judgment.

In the face of this supported motion for summary judgment, Malley-Duff could not have rested upon the mere allegations in its Complaint. *Celotex,* 54 U.S.L.W. at 4777; *Anderson v. Liberty Lobby, Inc.,* 54 U.S.L.W. at 4759; *Ness v. Marshall,* 660 F.2d 517 (3rd Cir. 1981); *Fireman's Insurance Company of Newark v. Dufresne,* 676 F.2d 965 (3rd Cir. 1982). Because Malley-Duff has the burden of proof at trial, it should have filed affidavits or othe similar materials identifying the acts that it claims established the alleged pattern. It has, to date, failed to identify by affidavit or otherwise any alleged similar predicate act in connection with the acquisition of any other general agency by the defendants which occurred either before or after its termination. Consequently, it was error for the Third Circuit to rely upon the allegations of Malley-Duff's Complaint and to hold that Malley-Duff had shown a RICO violation sufficient to successfully oppose the motion for summary judgment.

CONCLUSION

For the reasons hereinabove set forth and on the authorities herein cited, we respectfully submit that a Writ of Certiorari should issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

ALEXANDER BLACK

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CERTIFICATE OF MEMBERSHIP

It is hereby certified that all of the attorneys whose names appear below are members of the bar of this Court.

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